

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

April 15, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: February 6, 2004

Case No.: TIA-0049

XXXXXXX (the applicant or the worker) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, this matter should be remanded to OWA for further action.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent Physician Panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses.

1/ See www.eh.doe.gov/advocacy.

Generally, if a Physician Panel issues a determination favorable to the employee, the DOE Office of Worker Advocacy accepts the determination, and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application, the applicant asserted that from 1945 through 1990, he worked as a maintenance mechanic at the K-25 Plant at DOE site in Oak Ridge, Tennessee. He indicated that he routinely worked with friable asbestos in performing compressor maintenance. The applicant believes that exposure to asbestos at the plant caused him to suffer from asbestosis and chronic obstructive pulmonary disease (COPD).

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the applicant's claim of asbestosis, the Panel noted that the worker "does exhibit calcified pleural plaques and mild scarring of lung base. . . consistent with past asbestos exposures." However, the Panel concluded that "Claimant's file contains no indication that the diagnosis of asbestosis has been made by competent medical authority."

It was thus the opinion of the Panel that the worker did not suffer from asbestosis. Accordingly, the Panel issued a negative determination with respect to this illness.

With respect to the applicant's claim of COPD, the Panel found that the applicant's medical records do not show that he has been diagnosed with COPD, but rather that he has been diagnosed with and is being treated for asthma. It was the Panel's opinion that only asthma patients with unremitting airflow obstruction are considered to have COPD. The Panel noted that "the 6/18/03 medical record entry indicates that the claimant's chest is 'clear'; and the entry of 5/22/01 indicates that as a 74 y/o claimant was 'running a mile and a half . . .with no difficulty.'" The Panel also stated that "nothing in the claimant's file indicates that exposure to a toxic substance while a contract employee at a DOE facility contributed to claimant developing asthma ten years after his retirement."

II. Analysis

The applicant appeals the Panel's determination, maintaining that the Panel's decision was incorrect.

A. Asbestosis/Asbestos Related Disease

The applicant asks for a review of the rejection of his claim of asbestosis based on his lung nodule.

It is clear that the record in this case does not show that the worker suffered from asbestosis. As the Panel recognized, the worker was diagnosed in 2000 with "calcified pleural plaques and mild scarring of lung base on CT scan of chest, consistent with past asbestos exposure." The Panel also determined that "the claimant's file contains no indication that the diagnosis of asbestosis has been made by a competent medical authority." Since the applicant's claim was based on asbestosis, from which the worker did not suffer, and not on "pleural plaques," the Panel issued a negative determination.

As a rule, Physician Panels in these cases are not expected to reach out and consider illnesses not specifically claimed by an applicant. For example, if an applicant bases a claim on asbestosis, a Panel is not expected to consider whether a worker's diagnosed skin cancer was caused by exposure to a toxic substance at a DOE facility. *Worker Appeal* (Case No. TIA-0047), 28 DOE ¶ 80,333 (March 17, 2004). However, in this case, even though the worker does not suffer from the claimed disease, asbestosis, he clearly has a related lung

condition caused by exposure to the same substance, asbestos. The Panel specifically recognized that the worker suffered from pleural plaques "consistent with past asbestos exposures." Further, the Panel stated that, "given claimant's job title of Maintenance Mechanic, it can be assumed that claimant could well have been exposed to some level of airborne asbestos on a periodic basis while working as a contract employee with DOE. If claimant were to develop asbestos-related illness at some future date, the Physician Panel concludes that it would be *equally as likely as not* that this presumed and undocumented exposure to asbestos had significantly contributed to that future disease." (Emphasis in original.)

I believe that a re-evaluation of the Panel's negative determination is warranted. Pleural plaques is considered to be a precursor to asbestosis. Many applicants perceive asbestosis to include pleural disease, and for this reason do not request separate consideration of that illness. In this situation, I believe that the Panel should have specifically considered whether it is at least as likely as not that exposure to asbestos at the Oak Ridge K-25 Plant was a significant factor in aggravating, contributing to or causing the worker's asbestos-induced pleural disease. In its statement "if the claimant were to develop asbestos-related illness. . ." the Panel appears to have rejected the possibility that pleural plaques is an asbestos-related illness. However, it is our understanding that OWA considers pleural plaques to be an illness for purposes of the Physician Panel rule. Accordingly, if, upon remand, the Panel should maintain its stated conclusion that pleural plaques is not an asbestos-related illness, it should fully explain its rationale.

Accordingly, I will remand this case to the OWA for further action on this issue.

B. COPD

The applicant also appeals the Panel's decision regarding his assertion that he suffers from COPD. He contends that the statement that he ran a mile and a half with no difficulty in 2001 is incorrect and that he has not been "able to run for many years." Even if, contrary to the indication in his medical records, the applicant has not been able to run for many years, this does not mean that he in fact suffers from COPD, or that the Panel's determination was incorrect. As the Panel noted, the record does not support a diagnosis of occupationally related COPD. In fact, there is no mention of COPD in the applicant's medical record submitted in this proceeding. While the applicant has been diagnosed with asthma, the Panel concluded that in this case it does

not mean that the applicant has COPD. There is no evidence in the record supporting the claim that the applicant's asthma and COPD are synonymous. Further, the Panel found no exposure to a toxic substance at a DOE facility contributed to the applicant's asthma. There is no contrary evidence in the record of this case. Therefore, I will not grant the appeal with respect to COPD.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0049 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.
- (3) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 15, 2004